STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2002B052

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANTHONY GUARA,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

This matter was heard on February 25-26, 2002, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Gregg E. Carson, Assistant Attorney General. Complainant appeared in-person and was represented by N. Nora Nye, Attorney at Law.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, a suspension is substituted for the termination.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of available alternatives.

STIPULATIONS OF FACT

The parties stipulate that the following facts are true and accurate.

1. Complainant had a sexual relationship with Ms. R in September 2001.

2. Complainant was a Licensed Psychiatric Technician who was certified in 1983.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Anthony Guara, was employed by the Colorado Mental Health Institute at Pueblo (CMHIP), respondent, for approximately eighteen years as a Licensed Psychiatric Technician (LPT). He worked in the forensics division of CMHIP on the women's ward for about two years when he was dismissed effective November 26, 2001.

2. Complainant's duties included 1:1 counseling with patients.

3. Ms. R (R) was a patient at CMHIP from mid-July to mid-October 1999 in the women's forensic ward. During this three-month hospitalization for suicidal ideation, complainant served as her 1:1 counselor. They met once per week for a one-hour counseling session.

4. During these sessions, R expressed a personal interest in complainant, who, because of this, sought to have the patient

transferred to another therapist. The transfer was not accomplished, however, because it was discouraged by the treating team.

5. Subsequent to her discharge, R began sending gifts to complainant at his home. On Christmas Eve 1999, she showed up at his door. He told her she had to leave.

6. In December 1999, R telephoned complainant's supervisor at CMHIP and told him that she had given several gifts to complainant. The supervisor advised complainant to file an incident report every time he had contact with R.

7. R was hospitalized for 20 days in December 2000/January 2001 in the General Adult Psychiatric Division. Complainant did not know of this hospitalization.

8. Complainant filed incident reports about the gifts and visit from R. He did not know what to do with the gifts and did not use them.

9. On March 1, 2000, Charles Bennett, the appointing authority and Director of the Forensics Division, conducted a predisciplinary meeting with complainant pertaining to allegations that he had established a non-professional relationship with a former patient and had accepted gifts from the patient.

10. Complainant was not disciplined or corrected because there was insufficient evidence to establish that he had engaged in misconduct. In taking no action, Bennett indicated in writing that Policy 16.60 ("Staff Sexual Misconduct with Patients") and Policy 30.12 ("Conflict of Interest") of the hospital's Policy and Procedure Manual were relevant to the issues involved.

11. Complainant turned the gifts over to the hospital, and they were sent back to R.

12. In March 2000, R went to complainant's house. Upon her arrival, he contacted the CMHIP police, who told him that they did not have jurisdiction. He then contacted the city police, who came and escorted R off his property.

13. Complainant tried to get a restraining order against R, but was told that he could not do so because she was not a threat to him.

14. R began telephoning staff members and patients at CMHIP. She telephoned complainant at the hospital in October 2000. He reported this contact to his supervisor.

15. On September 26, 2001, R telephoned complainant at work. He did not recognize her voice at first. When he did, he told her he had to leave, and hung up. His supervisor told him to file an incident report, and he did.

16. On September 28, R again telephoned complainant at work. This time he asked for her telephone number. That evening, after drinking a few beers, he called R and said he would like to come over and talk to her. She was waiting for him when he arrived at the apartment complex by cab, and she escorted him to her apartment. He talked to her about their personal relationship being inappropriate.

17. A couple of days subsequent to the September 28 meeting, complainant called R again, and she invited him over to her apartment, where they engaged in sexual relations.

18. Complainant did not file incident reports or tell anyone about the September 2001 in-person contacts with R.

19. Officers of the Department of Public Safety are permanently assigned to CMHIP as hospital police. On October 30, 2001, R telephoned Officer Ortiz at CMHIP and said that she wanted to file charges against an employee, complainant. About a half hour later, at approximately 1:15 a.m., she arrived at the Public Safety Office to file her complaint. She stated to Officer Ortiz that, at about 11:30 p.m., she received a call from a reporter of *The Pueblo Chieftain* who told her that it would make good press if she talked about her relationship with complainant. She told Officer Ortiz that complainant had come to her apartment about six weeks ago and had sexual relations with her.

20. Late in the afternoon of October 30, complainant was called in to the Public Safety Office to talk about R's allegations. He admitted going to R's residence, but denied having sexual relations with her.

21. Division director Bennett received and reviewed two police reports, one of R making the October 30 complaint, and the other containing the interview of complainant. Based on the information contained in those two reports, Bennett scheduled a predisciplinary meeting and placed complainant on administrative leave.

22. The R-6-10 meeting was held on November 9, 2001. Complainant admitted having sexual relations with R.

23. Ethics training for LPTs addresses the need for establishing appropriate boundaries between staff and patients. The training does not address interacting with former patients.

24. This was the first time Bennett had to deal with a relationship between an LPT and a former patient, one who had been discharged from the forensics unit two years ago.

25. Bennett believes that the boundaries need to be maintained even after the patient is discharged, without a determinate time limit.

26. In determining that complainant had committed willful misconduct, Bennett took into account the fact that the relationship was with the same person who was the subject of the 2000 R-6-10 meeting. Even though he took no action, he considered his March 2000 letter to complainant to be a strong warning not to have a relationship with R.

27. In making the termination decision, Bennett considered three main factors: a) duration of time since the patient had been in the hospital—January 2001; b) complainant's openness—he did not disclose to the staff that the relationship occurred, and he denied it to the police; c) potential harm to the patient—her disease is treatable but not curable.

28. Complainant did not know of R's January hospitalization. It had been close to two years since she was a patient in the forensics unit, where he was her 1:1 counselor. He was no longer her treatment provider.

29. Complainant's conduct was off-duty, off-premises, and was not unlawful.

30. The hospital no longer has a duty of care to a patient who has been discharged. But the hospital still has some responsibility, Bennett believes, when the former patient has a disease that is treatable but not curable.

31. By letter dated November 20, 2001, the appointing authority terminated complainant's employment effective November 26, 2001, for violation of Policy 16.60, "Sexual relations between staff and patients shall be prohibited during the time of treatment and after discharge." Bennett also found a violation of the CMHIP Code of Ethics, which provides that employees are expected to "maintain professional relationships and boundaries with patients and families, during and after patients' hospitalization."

32. Complainant had received no prior corrective or disciplinary actions during his eighteen years of employment with CMHIP.

33. Anthony Guara filed a timely appeal of his dismissal on November 30, 2001.

DISCUSSION

I. Arguments of the Parties

Complainant argues that Policy 16.60 and the Code of Ethics are too vague to give notice to complainant that he would be dismissed for having a lawful relationship off-duty and off-premises with a former patient who had been discharged from his ward for two years. By comparison, complainant points to C.R.S §12-43-222, which applies to psychologists and prohibits sexual contact between psychologist and patient during the time in which a therapeutic relationship exists, or up to six months thereafter. He further contends that his private relationship with the former patient had no adverse affect on his job performance and does not constitute just cause for his dismissal after eighteen years of service.

Respondent, to the contrary, asserts that complainant received ample notice, both verbal and written, that a personal relationship with a former patient was improper. With this knowledge, respondent contends, complainant committed willful misconduct when he went to R's apartment and had sexual relations with her. Respondent argues that the lack of a determinate time limit in Policy 16:60 and the Code of Ethics is appropriate, since the policies must be applied on a case-by-case basis, apparently according to who the former patient is.

II. Analysis

A. The foundation of a vagueness challenge is that the law in question does not reasonably forewarn persons of ordinary intelligence of what is prohibited and lends itself to arbitrary or discriminatory enforcement because it fails to provide explicit standards for its application. Yet, the government need not spell out in detail all of the conduct that would result in termination. *Barrett v. University of Colorado Health Sciences Center*, 851 P.2d 258 (Colo. App. 1993).

Here, complainant understood that a personal relationship with a former patient was prohibited. He cannot, and does not, claim that he had reason to believe that the relationship was permissible. He was not caught by surprise by either Policy 16:60 or the Code of Ethics, or the appointing authority's interpretation of each.

Nevertheless, it had been two years since complainant had had a professional relationship with the former patient. He did not, at that time, have a duty of care to her, though the appointing authority's personal belief appears to be that a hospital's responsibility to a former patient never ends.

It would be wholly different if the relationship had occurred while complainant was on-duty, it was unlawful, or if R was under his present care. In that event, without a doubt, he would have been immediately dismissed. To impose the same sanction on an eighteen-year employee with no prior corrective or disciplinary actions under the factual circumstances of this case is so excessive as to be arbitrary, capricious or contrary to rule or law. *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936) (arbitrary or capricious exercise of discretion to fail to give candid and honest consideration of the evidence on which the exercise of discretion is based).

B. Board Rule R-6-9(B), 4 CCR 801, provides that, "If the board or hearing officer reverses a dismissal, but finds valid justification for the imposition of disciplinary action, a suspension may be substituted for a period of time up to the time of the decision." This rule is in accord with the Board's statutory authority to modify, as well as reverse, an action of an appointing authority. *See* §24-50-103(6), C.R.S. The period of suspension may not exceed 135 days. *Rose v. Department of Institutions*, 826 P. 2d 379 (Colo. App. 1991). Rule R-6-9(B) provides for the appropriate sanction in this case.

Respondent did not satisfy its burden to prove by preponderant evidence that there was just cause for the discipline of termination. *See Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994). In this instance, complainant's dismissal should be rescinded and a disciplinary suspension of 135 days be substituted pursuant to R-6-9(B) and *Rose, supra*.

III. Attorney Fees

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose "was instituted frivolously, in bad faith, maliciously or as a means of

harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award.

CONCLUSIONS OF LAW

1. Respondent's action of terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was not within the range of available alternatives.

ORDER

Respondent's termination action is reversed. A disciplinary suspension of 135 days is substituted for the termination. Complainant shall be reinstated to his former position with back pay and benefits, except for the period of suspension and any income complainant earned but would not have earned if respondent had not dismissed him.

DATED this ___ day
of April, 2002, at
Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of April, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

N. Nora Nye, Esq.
A.F.S.C.M.E. Colorado Council 76
3401 Quebec Street, #7500
Denver, CO 80207

And through the interagency mail, to:

Gregg E. Carson
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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